Supreme Court, U.S.
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No. 95-827

In The

Supreme Court of the United States

October Term, 1995

DAVID B. GROSS,

Petitioner,

vs.

CHEVROLET COUNTRY, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented in the Petition is confusing and misleading. The real question presented is whether the Mississippi Supreme Court correctly affirmed the grant of summary judgment in Respondent's favor based upon a proper construction of the applicable Mississippi long-arm statute in effect at the time and not the one referenced in the Petition, and based upon a proper application of the long-standing due process "minimum contacts" analysis to the undisputed facts in the case at bar.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are correctly set forth in the Petition. There are no parent or subsidiary companies to be listed.

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The Respondent, Chevrolet Country, Inc. (hereinafter "Chevy Country") respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Mississippi Supreme Court's opinion in this case reported at 655 So. 2d 873 (Miss. 1995), and its unreported Order dismissing Petitioner's Petition for Rehearing.

STATUTORY PROVISIONS INVOLVED

On page 2 of his Petition, Petitioner quotes Miss. Code Ann. § 13-3-57, which is known as Mississippi's long-arm statute. However, Petitioner has not cited the appropriate statute which was in effect at the time his lawsuit was filed. He has incorrectly cited the amended long-arm statute, which took effect July 1, 1991. The long-arm statute which was in effect at the time Petitioner filed his lawsuit and which is the applicable long-arm statute in the case at bar reads in pertinent part as follows:

> Any non-resident person, firm, general or limited partnership or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or non-resident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such non-resident of the Secretary of State of the State of Mississippi or his successor or successors in office, to be

> the true and lawful attorney or agent of such non-resident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts or arising from or growing out of such contract or tort, or an incident thereto, by any such non-resident or his, their, or its agent, servant or employee.

STATEMENT OF THE CASE

Chevy Country relies on the Statement of Facts and Procedural History set forth in the decision of the Mississippi Supreme Court found at *Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873 (Miss. 1995) (A. 3-7)[1] as an accurate Statement of the Case. David B. Gross (hereinafter "Gross") improperly argues the merits of his claim of negligence against Chevy Country on pages 3 through 5 of his Statement of the Case. For example, Gross states on page 4 of the Petition that, "the nut had been negligently left in the air intake system by the agents and employees of Chevrolet Country, Inc., on September 4, 1985." Gross also claims on page 5 of his Petition that, "there was no possible way that anyone other than Chevrolet Country could have been responsible for the nut in the air intake system . . . and that the doctrine of *res ipsa loquitur* is applicable here." Where are Gross' citations to the record to support these statements? Clearly, the statements regarding Chevy Country's alleged negligence contained in Gross' Statement of the Case are not based on facts in the record. Rather, they are based on pure speculation, conjecture and argumentative assertions.

It appears that Gross would have this Court believe that Chevy Country's negligence is a moot point and a foregone

1. References in the form ("A.") are to the Appendix contained in the Petition.

conclusion. However, Chevy Country has from day one denied any negligence or wrongdoing in this case. Furthermore, the Mississippi Supreme Court correctly pointed out in its majority opinion that Gross amended his Complaint to allege that Fowler Buick employees told Gross that the nut could have been left in the air intake system upon manufacture. (A. 4). The Mississippi Supreme Court also noted that previous work by Fowler had required removal of the engine cover. (A. 4). The fact of the matter is that this Court should not even be concerned with the merits of the underlying case of negligence. Indeed, Gross should not be allowed to waste this Court's time arguing the merits of the underlying claim of negligence against Chevy Country, since that issue has no relevance whatsoever to the issue on appeal. Therefore, all of the arguments made by Gross in his Statement of the Case concerning statements of alleged negligence on the part of Chevy Country should be disregarded by this Court.

Gross' statement and discussion on page 11 of the Petition of a National Highway Traffic Safety Administration study is likewise not relevant to the question presented on appeal. This statement is conclusory in nature and Gross draws assumptions from this article which have no factual basis in the record. Chevy Country would further point out that throughout the appellate process in this case, Gross has added documents and exhibits which were not a part of the original record on appeal. In fact, Chevy Country filed a motion to strike exhibits unilaterally added by Gross to his Petition for Rehearing, which was granted by the Mississippi Supreme Court. Chevy Country certainly denies the validity or application of the article in question to the case at bar and certainly denies that the report proves anything in this case. Furthermore, Chevy Country submits that Gross' injection of such an article into this proceeding amounts to an effort by Gross to prejudice Chevy Country before this Court through some type of guilt by association.

Chevy Country submits that the Mississippi Supreme Court properly affirmed the grant of summary judgment in favor of Chevy Country because of a lack of personal jurisdiction. This should remain the focus of the appeal and Gross' statements on page 11 of his Petition should be disregarded entirely.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED FOR REVIEW TURNS ON FACTS WHICH WERE HELD TO BE UNDISPUTED AND THE APPLICATION OF WELL-SETTLED RULES OF LAW TO THOSE UNDISPUTED FACTS.

The sole question presented is whether a Mississippi state court can properly exercise personal jurisdiction over Chevy Country in the case at bar. This question turns on questions of fact, which both the state circuit court and Mississippi Supreme Court held to be undisputed. This question also turns on the application of well-settled rules of law to those undisputed facts. Specifically, this case turns on the proper construction of the "doing business" provision of Mississippi's long-arm statute by Mississippi's highest state court. This case also turns on the application of the long-settled due process "minimum contacts" analysis.

There is nothing new or novel about this case and the question presented is certainly not one of "first impression" as Gross would have this Court believe. It should not be lost on this Court that Gross is not questioning the validity of Mississippi's long-arm statute, nor is he claiming that it is unconstitutional. Likewise, Gross is not questioning the validity or constitutionality of the long-standing due process "minimum

contacts" analysis, which must be applied in order to determine whether a state court should exercise jurisdiction over a non-resident defendant.

Contrary to Gross' assertion, the Mississippi Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor does the case present a question of federal law that has not been settled by the United States Supreme Court. Chevy Country submits that there has been no obvious or exceptional showing of error. Furthermore, there is no important or compelling reason for this Court to accept review of this case and re-examine the facts which have already been thoroughly examined by the state circuit court and the Mississippi Supreme Court.

Chevy Country submits that Gross' real complaint deals with what he perceives to be the mis-application of a properly stated rule of law. This, however, simply does not meet the criteria set forth in Rule 10 of the Supreme Court Rules of the United States for the grant of a Writ of Certiorari. Accordingly, Gross' Petition for Writ of Certiorari should be denied.

II.

THE COURT BELOW FULLY CONSIDERED AND PROPERLY STATED THE APPLICABLE RULE OF LAW IN MISSISSIPPI REGARDING THE "DOING BUSINESS" PROVISION OF MISSISSIPPI'S LONG-ARM STATUTE.

The Mississippi Supreme Court correctly stated the applicable rule of law regarding the "doing business" provision of Mississippi's long-arm statute, as it applied to the undisputed facts in the case at bar. Likewise, the Mississippi Supreme Court's application of the "minimum contacts" due process

analysis to the undisputed facts in the case at bar was proper and in line with this Court's holding in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). Contrary to Gross' misstatement on page 7 of his Petition, the Mississippi Supreme Court has not denied Gross any "constitutional rights." Furthermore, the Mississippi Supreme Court's decision is not, as Gross suggests on page 7, "highly contrived and completely erroneous," and such disrespectful language should be disregarded entirely.

Gross appears to suggest on page 8 of his Petition that he was proceeding solely under the "tort prong" of the long-arm statute and that the Mississippi Supreme Court used an erroneous reading of *Southern Pacific v. Fox*, 609 So.2d 357 (Miss. 1992), to judge the case at bar. However, this is a misstatement, as the Mississippi Supreme Court clearly pointed out that Gross alleged in his Complaint that Chevy Country had either done business in Mississippi or committed a tort within Mississippi. (A. 4). Furthermore, it is Gross, not the Mississippi Supreme Court, who has erroneously read *Southern Pacific v. Fox*. First, the accident in question in *Southern Pacific v. Fox* occurred in Texas, not Louisiana, as Gross erroneously suggested. Secondly, the Court in *Southern Pacific v. Fox* did not construe the "tort prong" of the long-arm statute. Rather, the Court in *Fox* focused solely on a construction of the "doing business" prong of the long-arm statute, as it existed **prior** to the amendment of the long-arm statute in 1991. The case *sub judice* was likewise filed prior to the 1991 amendment. Therefore, because Gross alleged Chevy Country was "doing business" under the same statute in effect when the *Fox* case was decided, the Court's construction of the "doing business" prong of the long-arm statute in *Fox* was both relevant and applicable.

Turning now to the case at bar, the undisputed facts reveal

that Gross is an adult resident citizen of the State of Mississippi. (R. 5)[2]. Chevy Country is a Texas corporation with its principal place of business in Austin, Texas. (R. 194). Chevy Country is a foreign corporation, not qualified to do business within the State of Mississippi, nor has it ever been qualified to do business within the State of Mississippi. (R. 194). Although Chevy Country participates in the "Mr. Goodwrench" program in Texas, it has never advertised in the State of Mississippi or entered into any type of agreement or contract of any kind with Fowler Buick GMC Truck, Inc., nor has it ever shared advertising costs or profits with Fowler Buick GMC Truck, Inc., in connection with the "Mr. Goodwrench" program. (R. 215-228). Chevy Country carries on no activity whatsoever in Mississippi. (R. 194). Chevy Country closes no sales and performs no services in Mississippi. (R. 194). Chevy Country has not availed itself of any of the privileges and benefits of Mississippi law. (R. 194). Chevy Country solicits no business in the State of Mississippi and does not advertise in Mississippi. (R. 218-219). Chevy Country does not regularly sell cars or service cars of Mississippi customers or residents, nor does it indirectly or through others, serve or seek to serve the Mississippi market. (R. 194). The Mississippi Supreme Court correctly held, based upon these undisputed facts, that Chevy Country was not "doing business" in the State of Mississippi, and Gross' argument that, "when the damages occurred in Jackson, Mississippi, the Respondent was doing business in Mississippi" is nonsensical and amounts to a twisted reading of the long-arm statute.

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2. References in the form ("R.") are to the Record filed with the Mississippi Supreme Court.

III.

THE DECISION OF THE MISSISSIPPI SUPREME COURT FOLLOWS AND CORRECTLY APPLIES WELL-SETTLED RULES OF LAW TO THE UNDISPUTED FACTS AND IS NOT IN CONFLICT WITH DECISIONS FROM ANY UNITED STATES COURT OF APPEALS.

The argument by Gross on pages 12 and 13 of his Petition that the Mississippi Supreme Court's decision in the case at bar conflicts with three Fifth Circuit Court of Appeals' decisions is simply not accurate. **In any due process "minimum contacts" analysis, the ultimate outcome will be dependent upon the facts of each individual case.** *See Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982). Indeed, this point is clearly illustrated in the three cases cited by Gross, which are distinguishable on their own facts.

For example, in *Brown v. Flowers Industries, Inc., et al.*, 688 F.2d 328 (5th Cir. 1982), a non-resident **purposely initiated a contact** in Mississippi through a telephone call to commit an intentional tort against a Mississippi resident. In the case at bar, however, there was no purposeful act initiated or contact made or business conducted in Mississippi by Chevy Country whatsoever.

In *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), a Mississippi plaintiff sought medical treatment in Tennessee. The plaintiff claimed she was injured as a result of the medical treatment in Tennessee and continued to feel the effects of the alleged negligent medical treatment in Mississippi. The District Court ultimately dismissed the plaintiff's Mississippi complaint against the Tennessee doctor in question based upon a lack of personal jurisdiction. The Court of Appeals affirmed the dismissal and specifically held that there was no evidence that

the doctor (Mabry) had ever purposely done some act or consummated some transaction in Mississippi. *Id.* at 1385. The Court further held that under the tort prong of the long-arm statute, a tort occurs when and where the actual injury takes place and not at the place of the economic consequences of that injury. *Id.* at 1384. This supports the position taken by Chevy Country in the lower court that assuming Chevy Country did commit some tort, which it denies, the tort was committed and the injury completed in the State of Texas and not in the State of Mississippi, which was merely the place of the economic consequences of that injury. Chevy Country submits that *Rittenhouse* certainly does not conflict with the decision by the Mississippi Supreme Court in the case at bar. To the contrary, if anything, *Rittenhouse* supports that decision and should be of little comfort to Gross.

In *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985), the non-resident automobile dealer had sold a car to residents of the State of Mississippi. After the car experienced mechanical difficulty, the non-resident dealer then sold and shipped a master cylinder to another Mississippi dealer for installation in the plaintiffs' vehicle. The Court of Appeals specifically held that the sale and shipment of the master cylinder into Mississippi represented **an affirmative act** by Crimson, the non-resident automobile dealer, to introduce its product into Mississippi for use in that state. *Id.* at 1172. By this shipment, Crimson purposely availed itself of the privilege of conducting activities in Mississippi and its connection with the forum is such that it should reasonably anticipate being haled into court there .... *Id.* Chevy Country submits that this case, like the other two United States Court of Appeals' decisions cited by Gross, is distinguishable on its facts and is certainly not in conflict with the Mississippi Supreme Court's decision in the case at bar.

IV.

THE COURT BELOW FULLY CONSIDERED AND PROPERLY APPLIED THE "MINIMUM CONTACTS" DUE PROCESS ANALYSIS TO THE UNDISPUTED FACTS IN THE CASE AT BAR.

The Mississippi Supreme Court correctly held that to allow the lower court to exercise in personam jurisdiction over Chevy Country in the case at bar would offend traditional notions of fair play and substantial justice. Gross would apparently have this Court totally disregard long-standing judicial precedent that in order for a Mississippi state court to assert personal jurisdiction over an out-of-state defendant, **two conditions must be met:** (1) There must be a statute conferring such jurisdiction; and (2) **the exercise of such jurisdiction must comport with the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.** *Williams v. Taylor Machinery, Inc.*, 529 So. 2d 606, 609 (Miss. 1988) citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). What Gross is asking this Court to do in his Petition is to completely ignore the requisite "minimum contacts" a defendant must have with the court attempting to exercise in personam jurisdiction. Indeed, Gross would apparently have this Court focus solely on the residency of the Petitioner and so long as he is a Mississippi resident, under Gross' logic, the Court could disregard any constitutional or due process inquiry into whether the non-resident defendant should in fact be subject to the in personam jurisdiction of a Mississippi state court. The Mississippi Supreme Court refused to embark on such a journey and properly affirmed the lower court's grant of summary judgment in favor of Chevy Country.

Chevy Country submits that the Mississippi Supreme Court properly held that before the lower court could exercise its in

personam jurisdiction over Chevy Country, it must examine the Fourteenth Amendment's due process limitation on state court personal jurisdiction. Indeed, Chevy Country submits that the general principle regarding the exercise of jurisdiction over a non-resident is that, "he may not be subjected to a litigation in a foreign jurisdiction unless he has certain minimum contacts with it such that the maintenance of a suit does not offend the traditional notions of fair play and substantial justice." *McDaniel v. Ritter,* 556 So. 2d 303, 309 (Miss. 1989) citing *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). These contacts must amount to something more than occasional **"fortuitous incidents"** where the defendant had in the past come into some casual, isolated contact with an in-state resident. *McDaniel,* 556 So. 2d at 309, citing *World-wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980).

Gross argues on pages 9 and 10 of his Petition that it would be fair and reasonable and not inconvenient to require Chevy Country to defend itself in Mississippi. Gross also suggests on page 10 that one consideration is that Chevy Country "would have no witnesses." Chevy Country submits that Gross is wrong on all accounts and Chevy Country certainly denies Gross' statement regarding its possible trial witnesses or that it would have no witnesses. What Gross seems to forget is that this Court has held that the concept of minimum contacts performs a dual function: "It protects the defendant against the burden of litigating in a distant or inconvenient forum, **and it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."** *Thompson, supra,* at 1169, quoting *World-Wide Volkswagen,* 444 U.S. at 292, 100 S. Ct. at 564. Discussing the latter function, this Court cautioned:

> Even if the defendant would suffer minimal or no inconvenience from being forced to

> litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as in instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Chevy Country submits that not only would it be inconvenient and unfair to be forced to defend itself in Mississippi in the case at bar, it would also be overreaching by a Mississippi state court beyond the limits imposed under the Due Process Clause.

Gross next suggests on page 10 of his Petition that foreseeability is one of the tests in applying the "minimum contacts" due process analysis and he cites *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) as support. However, Gross should take no comfort in *World-wide Volkswagen* since it is the very case that indicts his position and supports the Mississippi Supreme Court's decision that "traditional notions of fair play and substantial justice would be offended by assumption of jurisdiction in this case."

The issue presented in *World-wide Volkswagen* was whether an Oklahoma court could exercise in personam jurisdiction over a non-resident automobile retailer and its wholesaler distributer in a products liability action when the defendant's only connection with Oklahoma was the fact that an automobile sold in New York to a New York resident became involved in an accident in Oklahoma. In discussing the relationship between the New York automobile retailer and its wholesale distributer in the forum state, Oklahoma, the court found a "total absence of those affiliating circumstances that are a necessary predicate to

any exercise of state-court jurisdiction." *World-wide Volkswagen*, 100 S.Ct. at 566. As noted by the Court:

> **Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there, either through sales persons or through advertising reasonably calculated to reach the state, nor does the record show that they regularly sell cars at wholesale or retail to customers or residents or that they indirectly or through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: The fortuitous circumstances that a single Audi automobile sold in New York to New York residents happened to suffer an accident while passing through Oklahoma.**

Id.

The plaintiffs in *World-wide Volkswagen* argued that an automobile by its very nature is mobile and, therefore, it was reasonable that the car could cause injury in a distant state such as Oklahoma. **The Court, however, held that foreseeability alone has never been a sufficient benchmark for jurisdiction under the Due Process Clause.** *Id.* at 566. Rather, it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being haled into court there. *Id.* at 567.

As in *World-wide Volkswagen*, the Mississippi Supreme Court correctly found based upon the undisputed facts that Chevy Country carries on no activity whatsoever in Mississippi. Chevy Country closes no sales and performs no services in Mississippi. (R. 194). Chevy Country has not availed itself of any of the privileges and benefits of Mississippi law. (R. 194). Chevy Country solicits no business in the State of Mississippi. (R. 194, 218-219). Chevy Country does not advertise in Mississippi. (R. 218-219). Chevy Country does not regularly sell cars or service cars of Mississippi residents, nor does it indirectly, or through others, serve or seek to serve the Mississippi market. (R. 194). Furthermore, Chevy Country is an independent Texas dealership, just like Fowler Buick is an independent dealership, and Chevy Country has no relationship whatsoever with Fowler Buick or any other Mississippi dealership. (R. 226-230).

As the plaintiff did in *World-wide Volkswagen*, Gross in the case at bar seeks to base jurisdiction on one isolated occurrence and whatever inferences can be drawn therefrom: The fortuitous circumstance that a single GM van sold in Mississippi by a Mississippi dealership to a Mississippi resident happened to need repairs while passing through Texas. Clearly, the "minimum contacts" required between Chevy Country and the forum state, Mississippi, which must be present to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution do not exist. Therefore, the Mississippi Supreme Court was correct in holding that, even assuming Gross could obtain jurisdiction because of a tort having been committed in whole or in part in this state, Chevy Country is still not amenable to the in personam jurisdiction of the lower court because the assertion of jurisdiction over Chevy Country would offend "traditional notions of fair play and substantial justice."

CONCLUSION

This is a case that involves the application of well-settled rules of law to a set of undisputed facts. This is not a case of first impression. There has been no denial of a constitutional right nor is Gross claiming that a particular Mississippi or federal statute is unconstitutional. There is no important legal controversy or unsettled federal question at stake nor does the Mississippi Supreme Court's decision conflict with decisions from other state courts of last resort or a United States Court of Appeals. In the final analysis, there simply is no compelling reason to grant this Petition.

The Mississippi Supreme Court was correct in its construction and application of the "doing business" provision of Mississippi's long-arm statute. The Mississippi Supreme Court was also correct in its application of the law concerning the "minimum contacts" analysis of the Due Process Clause of the Fourteenth Amendment. The Mississippi Supreme Court correctly affirmed the lower court's grant of summary judgment in Chevy Country's favor in accordance with well-settled principles of law that are not in conflict with, nor do they represent a departure from, the usual course of judicial proceedings. Accordingly, Chevy Country respectfully requests that this Court deny Gross' Petition for Writ of Certiorari.

Respectfully submitted,

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